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In the Matter of Carriage of the Transmission of Digital Television Broadcast Stations Amendments to Part 76 of the Commission's Rules	CS Docket No. 98-120

COMMENTS OF AMERICA'S HEALTH NETWORK, GREAT AMERICAN COUNTRY, KNOWLEDGE TV, OUTDOOR LIFE NETWORK, SPEEDVISION NETWORK AND THE GOLF CHANNEL

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October 13, 1998

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TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY 1

II. COMMENTERS OFFER HIGH-QUALITY, NICHE PROGRAMMING THAT CONTRIBUTES SUBSTANTIALLY TO PROGRAMMING DIVERSITY 5

A. High Quality, Diverse Programming Is In The Public Interest 5

B. Commenters Are Developing Niche Networks That Offer High Quality Diverse Programming 8

1. America's Health Network 8
2. Great American Country 9
3. Knowledge TV 10
4. Outdoor Life Network 11
5. Speedvision 12
6. The Golf Channel 13

III. COMMENTERS ALREADY FACE SUBSTANTIAL OBSTACLES IN THEIR STRUGGLE TO ATTAIN COMMERCIAL VIABILITY 14

A. Niche Cable Networks Must Invest Heavily To Produce And Promote Programming That Is Attractive To Consumers And MVPDs 14

B. A Developing Network's Revenues Are Insubstantial Until It Reaches At Least 25 To 30 Million Subscribers 16

C. Commenters Must Have Access To Scarce Cable Channel Capacity To Increase Subscriber Distribution To Levels Needed To Reach Break-Even 18

IV. A DIGITAL MUST-CARRY REQUIREMENT WOULD SEVERELY JEOPARDIZE COMMENTERS' ABILITY TO BECOME AND REMAIN COMMERCIALLY VIABLE, CONTRARY TO THE PUBLIC INTEREST 23

A. A Digital Must-Carry Requirement Will Directly And Dramatically Reduce Already Scarce Extant Channel Capacity 24

B. New And Emerging Networks Would Be The First Program Sources Displaced By A Digital Must-Carry Requirements 27

C. The Costs To Consumers Imposed By A Digital Must-Carry Requirement Greatly Outweigh Any Perceived Benefits 28

V. THE COMMISSION'S CONSIDERATION OF DIGITAL MUST-CARRY AT THIS TIME IS PREMATURE 32

A. Today's Digital Marketplace Is Filled With Uncertainty 32

B. The Commission Should Permit Market Forces And Consumer Preference To Dictate When And How Digital Broadcast Signals Are Carried By Cable Systems 35

VI. THE COMMISSION *MAY NOT* REQUIRE CABLE OPERATORS TO CARRY BOTH DIGITAL AND ANALOG BROADCAST SIGNALS 36

A. The Commission Lacks Statutory Authority To Impose Additional Must-Carry Requirements On Cable Operators 36

B. A Digital Must-Carry Requirement Would Not Pass Constitutional Muster 38

CONCLUSION 43

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America's Health Network, Great American Country ("GAC"), Knowledge TV ("Knowledge"), Outdoor Life Network ("Outdoor Life"), Speedvision Network ("Speedvision") and The Golf Channel ("Golf") (collectively referred to as "Commenters") submit these comments in response to the Commission's Notice Of Proposed Rule Making ("NPRM") released July 10, 1998 in the captioned proceeding.

I. INTRODUCTION AND SUMMARY

As developing, niche networks looking to turn the corner to long-term commercial viability, Commenters have an immense interest in ensuring that the nation's cable channels, on which their distribution depends and on which their business plans were predicated, remain open to fair competition, and that those channels are not unfairly allocated to a preferred class of programmers. In order to become and remain commercially viable, Commenters must not only maintain, but increase, their current subscriber distribution levels. Cable networks' two revenue streams -- affiliation fees and advertising revenues -- are directly tied to subscriber distribution. Without sufficient carriage on cable systems, developing cable networks, such as Commenters, cannot achieve the viewership levels necessary to break-even, and many will inevitably fail, depriving American television viewers of the diversity, choice and value that Congress and the Commission have sought to promote.

Digital must-carry not only would reduce the amount of extant channel capacity available to developing networks such as Commenters, but would force the majority of the nation's cable systems to drop a substantial number of cable networks to accommodate redundant broadcast signals. Faced with the impossible task of deciding which networks to eliminate, cable systems would inevitably choose to drop developing, niche networks such as Commenters, because they cater to more specialized audiences and have not been competing long enough to establish the same breadth and level of subscriber loyalty as some of their older and more well-established brethren. Thus, developing networks would be viewed as "dispensable" by many cable operators. Programming diversity, which Congress and the Commission have otherwise sought to promote, would suffer immeasurably, at the very time when surveys indicate that more and more subscribers are turning to niche networks to view original, quality programming.

Even absent a digital must-carry requirement, Congress' decision to give additional free spectrum to broadcasters for digital signals has created a new, privileged class of competitors for cable operators' scarce channel capacity over the next several years. In fact, the major network affiliates already are in carriage negotiations with cable operators for digital signal carriage. Now, the Commission is considering giving these new competitors an additional leg-up -- a preferred status -- vis a vis less favored cable networks in the negotiating process for channel space on the nation's cable systems.

Digital must-carry clearly threatens to do more harm than good. Understandably, the Commission wants to ensure that subscribers receive the benefit of digital broadcast television sooner rather than later. After all, Congress gave away billions of dollars worth of spectrum for free to broadcasters. But cable television is not a bottleneck to viewers' reception of digital broadcast signals. Technology exists today that would easily enable cable consumers to receive digital broadcast signals over the air using an antenna and a remote control with an A/B switching device. In addition, the direct broadcast satellite industry, whose operators today have enough subscribers to rank among the nation's top five cable operators in terms of size, is in the process of developing its own digital programming distribution platform, which includes the transmission of local broadcast stations.

Moreover, subscribers would not benefit from, and in fact would be harmed by, a digital must-carry requirement. In place of a niche, developing cable network, many subscribers would see a blank screen throughout the programming day. Many others would see only one or two hours of redundant analog broadcast programming. The infinitely small number of consumers that can afford the expensive equipment needed to receive an HDTV signal might see improved video quality on the digital channel, but would see programming for only one or two hours, and would then be receiving a redundant analog channel.

The negative impact of a digital must-carry requirement would be felt immediately. While the Commission's transition period purports to phase in digital must-carry requirements over time, in fact, over half of the nation's cable television subscribers reside in the top 30 television markets, and thus would feel the effect of the rules as soon as first quarter 1999 and no later than November of 1999. The threat of digital must carry alone already is causing many cable operators to postpone carriage decisions and to decline to launch developing niche programmers such as Commenters.

The Commission has acknowledged the importance of developing a record to support any rules that it may ultimately adopt in this proceeding. However, the record is certain to demonstrate that, in light of the harm that would befall cable networks and consumers, compared to the speculative needs of broadcasters and uncertain state of the digital marketplace, digital must carry rules should not be adopted.

Moreover, the Communications Act does not grant the Commission authority to require carriage of both analog and digital broadcast signals, and the lack of any such authority substantially increases the likelihood that any such requirement would be found unconstitutional. Indeed, the analog must-carry requirements barely survived constitutional challenge. In upholding the analog must-carry requirement, the United States Supreme Court relied in large part upon its deference to Congress' fact-finding role and the factual record supporting the government's asserted need for must-carry, both of which are absent from the current digital must-carry proceeding.

In sum, increasing the demands on already scarce cable system channel capacity by requiring cable systems to displace diverse cable programming with broadcasters' redundant digital and analog signal transmissions is not in public interest. Moreover, the Commission lacks the legal authority necessary to impose additional signal carriage requirements on cable operators, and thus, *may not* adopt a digital must-carry requirement.

II. COMMENTERS OFFER HIGH-QUALITY, NICHE PROGRAMMING THAT CONTRIBUTES SUBSTANTIALLY TO PROGRAMMING DIVERSITY.

A. High Quality, Diverse Programming Is In The Public Interest.

Congress and the Commission have long sought to promote diverse and high quality television programming. One of the primary purposes of Title VI, when first adopted, was to "assure that cable communications provide *and are encouraged to provide* the widest possible diversity of information sources *and services* to the public."[1] In adopting the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), amending Title VI, Congress reiterated its policy objective to ". . . promote the availability to the public of a *diversity* of views and information through cable television and other video distribution media."[2] In addition, Congress directed the Commission to adopt regulations in order to promote "the public interest . . . by increasing competition and *diversity* in the multichannel video programming market and the continuing development of communications technology."[3]

Moreover, in recent years, Congress and the Commission have expressly acknowledged, and sought to guard against, the potential chilling effect of regulation on the development of new programming services. For example, in adopting the horizontal ownership limitations in Section 633, Congress directed the Commission not to impose "limitations that will impair the

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[1]47 U.S.C. § 521(4)(emphasis added).

[2]1992 Cable Act, Section 2(b)(1), 106 Stat at 1463 (emphasis added).

[3]47 U.S.C. § 548(c)(1) (emphasis added); *see also* § 548(c)(4)(D). In 1996, Congress sought to promote program diversity in its rules governing Open Video Systems. *Implementation of Section 302 of the Telecommunications Act of 1996 (Open Video Systems)*, 11 FCC Rcd 20227 (1996) at ¶ 224 (citing Conference Report at 172, 177-78). The Commission itself has recognized that the 1992 Cable Act program access-exclusivity restrictions were intended to "promote diversity by providing incentives for cable operators to promote and carry a new and untested programming service." *Cablevision Industries Corp. and Sci-Fi Channel*, 10 FCC Rcd 9786 (1995) at ¶¶ 27-29.

development of diverse and high quality programming."[4] The Commission recently acknowledged the potentially chilling effects of regulation on the development of diverse, high-quality programming when it expanded the exemption from closed captioning requirements for new programming networks.[5] Similarly, in 1994, the Commission recognized the unintended negative impact of its initial rate regulations on the development of diverse programming services.[6] Today, more than ever, Congress and the Commission are intent on increasing the programming choices available to consumers.[7]

The effort to increase diverse, quality programming services and increased consumer choice has met with great success.[8] This decade has been marked by a dramatic increase in the

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[4]47 U.S.C. § 533(f)(2).

[5]*Order on Reconsideration*, Closed Captioning and Video Description of Video Programming -- Implementation of Section 305 of the Telecommunications Act of 1996 -- Video Programming Accessibility, FCC 98-236, MM Docket No. 95-176 (rel. Oct. 2, 1998) ("*Closed Captioning Order on Recon.*") at ¶ 54 (expanding exemption "to include numerous nascent networks that are continuing to experience growing difficulties").

[6]*See Waiver Of The Commission's Rules Regulating Rates For Cable Services*, 11 FCC Rcd 1179 (1995)("the Commission is guided by the goal of reducing unnecessary burdens on cable operators and providing the cable operators incentives to innovate and promote program diversity in response to competition"); *Sixth Order On Reconsideration (Rate Regulation)*, 10 FCC Rcd 1226 (1994) at ¶ 22 (modifying the going-forward rules to ease the burden on establishing new networks).

[7]*See, e.g., Fourth Annual Report*, Annual Assessment of the Status of Competition in Markets for Delivery of Video Programming, FCC 97-423, CS Docket No. 97-141, 11 CR 147 (rel. Jan. 13, 1998) ("*Fourth Annual Report*") (Separate Statement of Chairman William Kennard) (expressing Commission's intent to "explore ways that the cable industry can provide consumers a wider range of choice in programming and prices, such that a consumer need not purchase programming that he or she does not want to watch").

[8]*See, e.g.*, Linda Moss, *Fall Steam Can't Stem Erosion*, MULTICHANNEL NEWS, Oct. 5, 1998, at 1 (showing 15 percent increase in cable ratings from last Fall, and decrease in broadcast ratings); Manuel Mendoza, *With Its Risk-Taking Fare, Cable Continues To Steal The Broadcast Networks' Audience*, THE DALLAS MORNING NEWS, Jul. 18, 1998), at 1C; Hal Boedeker, *Cable Brings Diversity To Television Channel-Surfing*, PHOENIX GAZETTE, June 26, 1995, at C5 ("Cable can be counted on for news, for variety, for risk-taking programming."); Donna Gable, *Disability Channel Widens Boundaries*, USA

number of new programming networks providing varied programming of superior quality to the viewing public.[9] Today's developing cable networks provide in-depth coverage of niche subject areas for segments of the viewing public that were formerly underserved or unserved, and would today still be underserved by the traditional broadcast television medium. The most recent data reveals that in 1998 there are over 250 national and regional cable networks competing for carriage, approximately 133 of which are national, basic cable networks.[10] At least 57 planned programming services are in the wings, preparing to launch.[11]

As cable network programming improves, and more diverse, quality, networks are distributed on the nation's cable systems, carriage, consumers are demonstrating an intense interest in and appreciation for cable network programming through increased viewing. In August of this year, basic cable networks averaged a 24.3 Nielsen rating, while the "big four" broadcast networks averaged only a 22.3 Nielsen rating.[12] This trend continued into the first week of the broadcast networks' new Fall season, during which cable programming posted an

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TODAY, Mar. 29, 1995, at 30 ("Cable television—an oasis for niche programming—is about to get even more diverse.").

[9]Even Vice President Gore, a former critic of the cable television industry, has praised the industry on the diverse programming that it is now providing. AP Online, April 30, 1996. Vice President Gore complimented the industry on its cutting-edge programming, its contribution to the "dialogue of our representative democracy," and its "forward-looking pursuit of the public interest." *Gore, Turner Predict Tough Future For Cable*, WASHINGTON TELECOM NEWS, May 6, 1996.

[10]National Cable Television Association, CABLE TELEVISION DEVELOPMENTS (Spring 1998) ("NCTA CABLE BOOK") at 6, 27-125.

[11]*Id.* at 126-42.

[12]Donna Petrozzello, *Basic Cable Beats Broadcast Networks For Week*, BROADCASTING & CABLE, Aug. 31, 1998, at 13.

unprecedented 23.2 Nielsen rating, up 15 percent from a year ago.[13] Improved cable ratings offer further proof that viewers are increasingly attracted to the unparalleled quality and diversity of cable programming. As Chairman Kennard so aptly queried recently: "*what remains that makes broadcasters so unique as to require cable coverage*?"[14]

B. Commenters Are Developing Niche Networks That Offer High Quality Diverse Programming.

Commenters are six developing programming networks struggling to overcome regulatory and financial hurdles so that they may become and remain commercially viable. They offer a level of in-depth coverage of diverse, niche subject areas such as nature, sports, health, music, and education that is not offered by broadcasters or general entertainment networks.

1. America's Health Network

America's Health Network, an independent cable network, launched in March 1996, and currently has 8.5 million full-time subscribers. Of these, approximately 5.125 million (60 percent) are cable television subscribers, and 3.375 million (40 percent) are DBS subscribers

America's Health Network is the first around-the-clock television resource for health and medical information and is particularly valuable for people in rural areas, which are chronically underserved by the medical community. The network's predominantly original programming includes: three live, call-in shows during which physician and other healthcare professional hosts respond to viewers' call-in questions on family medicine, pediatrics, and veterinary medicine (*Ask*

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[13]Linda Moss, *Fall Season Can't Stem Erosion*, MULTICHANNEL NEWS, Oct. 5, 1998, p. 1.

[14]Monica Hogan, *Kennard Urges Support For Digital Television*, MULTICHANNEL NEWS, Sept. 21, 1998, at 66 (emphasis added); *see also* Ted Hearn, *FCC Chief Skeptical Of Must-Carry*, MULTICHANNEL NEWS, Sept. 28, 1998, at 8 (quoting Deborah Lathen, chief Cable Services Bureau, "broadcasters have to shoulder the burden of demonstrating that cable operators need to carry their digital-TV signals . . . [N]o one should assume that they have a right to be carried").

the Doctor series); a talk show devoted to health issues that are of particular importance to women (*Women & Children First*); a magazine-style series that focuses on exercise, fitness, diet and nutrition (*High on Health*); and a real-life drama series that follows patients through surgical procedures (*O.R.: Behind the Mask*). In addition, America's Health Network features regular health news bulletins, prime time specials on particularly timely and important health topics, including regular cancer specials produced in conjunction with the American Cancer Society, and continuing medical education programs for physicians and other healthcare professionals. The network's programming is transmitted primarily in English but its *Ask the Doctor* series also is transmitted in Spanish in selected communities nationwide.

The network's video programming also is carried live on its Web site, AHN.Com. As part of the network's mission -- to provide consumers with easy access to reliable health and medical information presented in a caring, compelling manner -- America's Health Network presented a live birth on television and over its Web site in June 1998, which attracted the most visitors ever to a single-day live broadcast event on the Internet. The network followed in August with a live open heart surgery, performed by Dr. Denton Cooley, that was also aired both on television and the network's web site.

2. Great American Country

Great American Country, a 24-hour country music channel, was launched on December 31, 1995 in response to the dramatic growth of the country music market in the United States and presently has approximately 4.5 million subscribers. Forty-three million Americans listen to country radio stations nationwide. GAC provides more than 400 country music videos each week, a countdown of the best country music videos, behind the scenes interviews with artists, and previews of upcoming artists. GAC was designed to provide a high-value network that satisfies industry and consumer demand for a better country music channel. Because GAC is digitally compressed via DigiCipher II technology, affiliates interested in receiving GAC's programming must install a GI DSR-4500 IRD at an approximate cost of $1,650 per headend. GAC offers local cable operators four minutes of local advertising time and transmits less national advertising than other competing cable networks.

3. **Knowledge TV**

Knowledge TV was launched in November 1987 as Mind Extension University, and repositioned in October 1996 as Knowledge TV. The network currently has 22 million subscribers. Knowledge TV is dedicated to helping viewers with their everyday lives by delivering useful, personally relevant news and information with programming focused on the issues of greatest importance to adults, particularly health, money and technology.

Knowledge TV's programming includes nationally exclusive news and information programs addressing health (*RxTV* and *Pulse*), technology (*New Media News*), and personal finance (*On the Money*) issues, and focuses on the top "need to know" learning categories for adults. In addition to these news and information programs, Knowledge TV's programming includes two regional Emmy award winning shows: *Computer Kids*, a weekly show for children and families about educational and family software and multimedia products; and *Disc Doctors*, a show offering cures for common -- and not so common -- computer ailments.

Its line-up of original productions also includes: *Living Right*, a total health show providing tips for proper diet, exercise and stress reduction; *Alternative Medicine*, a series exploring alternative remedies such as acupuncture, aroma therapy and homeopathic medicine;

Business Traveler: The Survivor's Guide, a program providing advice for better business and vacation travel; *Women at the Top*, a program that explores issues facing women and profiles those who have broken through the glass ceiling to achieve top ranks in business, the military and other professions; and *You, Inc.* and *Follow That Dream*, two series designed to educate viewers on how to start their own business strategies through informative profiles of others who have successfully pursued that course.

4. Outdoor Life Network

Outdoor Life Network, which launched in June 1995, distributes its programming to approximately 13.5 million subscribers. The network focuses on the needs and interests of the nation's 80 million outdoor enthusiasts, which are comprised equally of men and women. Outdoor Life is devoted exclusively to outdoor recreation, wildlife, ecology, wilderness conservation and adventure. More than 1200 hours, or 40 percent, of Outdoor Life's programming line-up is originally produced.

The network's programming features outdoor and environmental activities and interests, such as wildlife and wilderness conservation, fishing, mountaineering, hunting, camping, backpacking, mountain biking, white water sports and skiing. Examples of Outdoor Life's programming include: *Adventure Quest*, a two-time Emmy Award-winning series of original adventure and expedition documentaries from around the world; exclusive coverage of World Cup Mountain Bike events and Fiswall Cup Skiing Races; *Global Family*, a program that takes viewers to the corners of the earth in exploration of exotic wildlife; and *Earth Rescue*, a program focused on today's environment and ecological issues.

5. Speedvision

Speedvision Network launched in January 1996, and currently serves approximately 14.5 million subscribers in North America. The network distributes unique programming targeted at automotive, marine and aviation enthusiasts, whose viewing interests previously were underserved by broadcast and general interest cable networks. More than 1500 hours of the network's programming is originally produced.

The network's programming categories include lifestyle and magazine, historical/ documentaries, news and information, competition events and instructional how-to programs. Speedvision's coverage of competition events includes many events not covered by other networks. Examples of Speedvision's programs include: live coverage of Formula 1 qualifying races; *American Thunder*, a magazine-style program focusing on the American motorcycle lifestyle; *Inside Winston Cup Racing*, a review of each of NASCAR's premier races featuring analysis from the sport's most popular drivers; *Sport Flying*, a 26-episode series on aspects of aviation of interest to recreational pilots; and *Ship Shape*, a how-to show for powerboat enthusiasts who are interested in maintaining their crafts themselves. In addition, Speedvision offers current news and information five nights a week from 7 p.m. to 8 p.m.

The American love for the automobile and recreational transportation is well documented and is apparent from the over 245 vehicle-based magazine titles on the American newsstand. Over half of all adult men are vehicle enthusiasts and women make-up approximately 20 percent of the network's target audience.

6. The Golf Channel

The Golf Channel was launched in January 1995, and currently has 18.6 million United States subscribers. Of these, approximately 15 million (83 percent) are cable television subscribers and 3 million (17 percent) are DBS subscribers. Golf, which is digitally produced, is carried on 835 analog cable systems and 97 digital cable systems.

Golf offers new and unique programming tailored to the nation's 26.5 million golf enthusiasts, who comprise approximately 5.6 percent of nation's television viewers. Golf provides in depth coverage of more than 70 professional golf tournaments from around the world, none of which are covered by other television networks in the United States. In fact, Golf carries more live coverage of golf than all of the broadcast and cable networks combined. The network also features instructional programming from top golf teaching professionals, including segments specifically tailored to young golfers, and up-to-the minute golf news and statistics. In addition, Golf offers locally produced, golf-topical programming focusing on local subject matter, such as area golf tournament results and local golf professional instruction.

* * *

In sum, diverse, quality programming networks such as Commenters -- the type that Congress and the Commission have sought to promote -- have emerged, ready and able to meet the viewing needs of the nation's cable television and other multi-channel subscribers. Commenters merely are representative of the scores of other niche networks that are striving to meet viewers' specialized needs and interests. Additional niche networks, focusing on such diverse areas as computers, antiques, space exploration, human rights, and a panoply of others, have been, or are, in the process of being launched and are committed to providing a breadth, depth and quality of coverage that broadcast and general entertainment television have never produced and probably never will. The question is: Will the Commission now impose on these programmers a regulatory penalty that ultimately could ensure their demise?

III. COMMENTERS ALREADY FACE SUBSTANTIAL OBSTACLES IN THEIR STRUGGLE TO ATTAIN COMMERCIAL VIABILITY.

Today's cable networks typically operate at a loss for a number of years due to the enormous costs involved in launching a network and the fact that the networks' primary revenue sources -- advertising and affiliation fees -- are linked directly to subscriber distribution. To generate the revenues needed to turn the corner to profitability, cable networks must increase subscriber distribution substantially in their first five years of operation. The level of distribution needed to recover accumulated investment is even more substantial. To obtain distribution, cable networks need access to scarce channel capacity ("shelf-space") on cable systems. However, cable channel capacity is growing at a much slower rate than once predicted, and increasing regulatory demands actually are further reducing the number of channels for which cable networks must compete.

A. Niche Cable Networks Must Invest Heavily To Produce And Promote Programming That Is Attractive To Consumers And MVPDs.

There are numerous substantial costs associated with getting a new network off the ground. As the Commission recognized recently in its *Order on Reconsideration* in the closed captioning proceeding, "new networks, especially in the early stages, frequently must pay for carriage, and struggle to become an accepted venue for national advertising. These economic circumstances create significant accumulated debt and deferred earnings which must be recovered from revenues if the network is to remain viable."[15] Launching a new network generally costs $100 to $125 million, or more.[16] Expenditures associated with starting a network include research, facility construction, program acquisition, program production, marketing and promotion, employment, and signal transmission.

Cable networks must make enormous initial investments in the production and acquisition of high quality programming in order to create programming packages that are desired by the viewing public, and thus, MVPDs. Golf, for example, has invested over $10 million in a state-of-the-art digital production center and over $120 million in the production and acquisition of programming. Speedvision and Outdoor Life will spend over $110 million combined to produce and acquire original programming by the end of their third year of operation and $230 million by the end of their fifth year. To date, America's Health Network has invested over $99 million in the development of its network and the investment required for the network to reach break-even is estimated to be $160 million.

Promotion and marketing also comprise a large part of developing networks' costs. For example, America's Health Network spends over $5 million annually to market its network and

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[15] *Closed Captioning Order on Reconsideration*, FCC 98-236 at ¶ 54; *see also New England Cable News*, 9 FCC Rcd. 3231 (1994) at ¶ 35 ("It is not uncommon for new programming services to sustain losses for long periods of time before their investors see any return on investment.").

[16] *See* Ted Hearn, *Viacom to FCC: Go Slow on Access*, MULTICHANNEL NEWS, Sept. 7, 1998, at 50 (quoting Viacom's August 1998 comments responding to Commission's Fifth Annual Competition Inquiry stating that a network's typical start-up costs are $100 to $125 million); Richard Mahler, *Struggling To Hook Up With Viewers*, L.A. TIMES, Apr. 29, 1996, at F1 (quoting media analyst David Londoner, with Schroder Wertheim, and MTV founder and CEO of E! Network, Lee Masters); Richard Katz, *Acquired or Original?: New Networks are Making Different Decisions than Their Predecessors*, MULTICHANNEL NEWS, Jan. 16, 1995, at 8A (estimates of investment in Home and Garden Television, as of January 1995, were approximately $100 million; HGTV has constructed a 45,000-square-foot production facility).

Golf will spend $5 million to market its network in 1999. In addition, in today's buyer's market for programming, it is not uncommon for developing networks to offer substantial launch payments to gain carriage.[17] For example, Pax Net, a programming service recently launched by Paxson Communications Corporation, reportedly is paying about $ 6 per subscriber for access to areas in which the company does not have a broadcast presence.[18] And Sci-Fi, at close to 50 million subscribers, is still offering $2 to $3 in launch support.[19] In addition, Commenters all offer a combination of launch payments and periods of free service to obtain and increase distribution.

B. A Developing Network's Revenues Are Insubstantial Until It Reaches At Least 25 To 30 Million Subscribers.

Basic cable networks' cash flow derives primarily from two sources: affiliation fees and advertising revenues -- both of which are directly linked to subscriber distribution.

Advertising dollars are critical to cable networks' long-term success.[20] However, for programmers with fewer than 10 million subscribers, advertising revenues are minimal, and

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[17] *See* Dennis H. Liebowitz, *Buyer's Market for Programming -- Thanks to TCI, News Corp.*, CABLE TV AND NEW MEDIA LAW & FINANCE, Feb. 1997, at 1 ("the new math makes it more expensive to absorb the cost of launching a new network. In turn, this favors existing networks . . "); Jim Cooper, *Throwing Money Around,* CABLEVISION, Jan. 27, 1997, at 14 ("Animal Planet is paying for carriage. . . . Networks like Sundance Channel, Independent Film Channel, Outdoor Life, Speedvision and others are all going to have to start paying just to get on systems -- that is, using money that traditionally went into programming."); John M. Higgins, Richard Katz, *Swimming Upstream -- Programmers Caught in TCI's Recovery Net*, MULTICHANNEL NEWS, Nov. 18, 1996, at 1 (TCI charging $14 and $8 per sub to launch Fox News and Animal Planet, respectively).

[18] Sara Brown, *Paxson makes cable connections*, BROADCASTING & CABLE, Aug. 3, 1998, at 17.

[19] Linda Moss, *Sci-Fi Tries Incentives To Fuel Growth*, MULTICHANNEL NEWS, Oct. 5, 1992, at 10 (Sci-Fi offering cash incentives of $2 to $3 per subscriber).

[20] Eric Schmuckler, *CAB Report: The Big Picture Channel Crossings*, MEDIAWEEK, April 14, 1997 (real growth over time comes from advertising).

advertising revenues do not become at all significant until a network surpasses at least 30 million subscribers.[21] Generally, the smaller, targeted audience offered by a new niche network "isn't the lure it might seem" to media buyers.[22] Consequently, programmers are dependent initially, and primarily, upon affiliation fees to cover the significant up-front and operating costs associated with launching a network.

However, new networks are able to generate only limited affiliation fees during their early years of operation because of the intense competition among programming networks vying for scarce, extant channel capacity. In fact, some networks have decided to forego charging affiliation fees altogether for a number of years to distinguish their networks in the struggle for cable carriage. Commenters have each offered their services for free for periods ranging from six months to five years. Other networks have had to offer even longer periods of free service to gain carriage -- as much as *ten years* free service.[23]

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[21]*See* Mike Reynolds, *CBS Stumbles in Cable Distribution Game*, CABLE WORLD, Aug. 3, 1998, at 8 ("Typically, an ad supported network needs 40 million subscribers to attract ad revenues."); Aaron Barnhart, *Cable Networks Get Choked In Channel Congestion. Even With Upgrades, Niche Contenders Outnumber Open Spaces*, THE KANSAS CITY STAR, April 4, 1997, at E-1 (any network reaching fewer than 30 million isn't getting advertising dollars that will make them profitable); Charles Haddad, *Cartoon Network Tops 30 Million; Large Subscribership Helps Sell Advertising*, THE ATLANTA JOURNAL AND CONSTITUTION, Oct. 1, 1996, at 5C ("Advertisers don't seriously consider most cable channels until they garner 30 million subscribers, say industry experts.").

[22]Mike Galetto, *Media Buying: Explosion Of Channels Upping Ante For Agencies*, ELECTRONIC MEDIA, May 19, 1997, at 22; Joe Schlosser, *Cable's Little Engines That Might: Niche Channels Search For Shows, Bucks And Eyeballs; Small Start-Up Cable TV Channels*, BROADCASTING & CABLE, March 31, 1997, at 62 (niche networks almost guarantee lower ratings from an ad revenue point of view).

[23]Rich Brown, *Networks Hope Low Rates Will Buy Them A Place On Expanded Lineups*, BROADCASTING & CABLE, Dec. 5, 1994, at 6 (Television Food Network offered free to cable operators for 10 years).

The obstacles to gaining carriage facing cable networks do not magically disappear once they meet their break-even goals. Even after a network has attained 25 million or more subscribers, it must still provide substantial launch incentives consisting of a combination of a period of free service, cash payments to operators for marketing, and other benefits, in order to gain carriage.[24] Thus, both affiliation fees and advertising revenue are often limited for cable networks for many years after launch.

C. Commenters Must Have Access To Scarce Cable Channel Capacity To Increase Subscriber Distribution To Levels Needed To Reach Break-Even.

Satellite programming networks such as Commenters must have 25 to 30 million subscribers to generate the revenues needed to reach break-even.[25] Unlike broadcasters, satellite programming networks cannot reach subscribers on their own; they must rely on the distribution resources of MVPDs. Even if a network were to obtain carriage on all of the non-cable MVPDs, it would only reach approximately 9.5 million subscribers.[26] Thus, carriage by cable operators is essential to Commenters' survival.

Industry predictions of expanding cable channel capacity upon which Commenters formulated their original business plans appear, in hind-sight, to have been overly optimistic. As

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[24]Linda Moss, *Sci-Fi Tries Incentives To Fuel Growth*, MULTICHANNEL NEWS, Oct. 5, 1998, at 10 (at close to 50 million subscribers, Sci Fi is offering $2 to $3 in launch support and free carriage, in some cases); Linda Moss, *At 50M Subs, Is 70M A Dream?*, MULTICHANNEL NEWS, July 27, 1998, at 8, 22 (explaining "fierce competition" for few available analog spots).

[25]*Closed Captioning Order On Reconsideration*, FCC 98-236 at ¶ 45 (citing comments of Game Show Network, "it is generally impossible for a new, niche network to break even until its distribution reaches 20 million subscribers"); Rich Brown, *Who's watching the food?*, RESTAURANT BUSINESS, Apr. 10, 1995, at 62 (stating break-even number for Television Food Network to be "about 25 million" subscribers).

[26]*See Fourth Annual Report*, CS Docket No. 97-141 at Appendix E, Table E-1.

the Commission stated in its NPRM, approximately two-thirds of the nation's cable systems currently are channel-locked.[27] As of October 1, 1997, sixty percent of the nation's cable television systems still had fewer than 54 channels and over 40 percent of the nation's cable television subscribers were served by systems with fewer than 54 channels.[28] Moreover, the majority of cable television systems have not deployed, and are not ready to deploy, digital compression technology.[29] Nor will channel capacity increase rapidly through promised cable system rebuilds and upgrades, which generally require an enormous investment of resources and a significant number of years to complete.[30]

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[27]NPRM at ¶ 45; *see also* Stewart Yerton, *Channels Slugging It Out For Viewers At N.O. Show*, THE TIMES-PICAYUNE, March 18, 1997, at C-1 ("If we go to add something . . . we've got to drop something," said Steve Sawyer, spokesman for Cox Communications.); Jim McConville, *Goodies Not Good Enough For Some*, ELECTRONIC MEDIA, March 17, 1997, at 56 ("Cable operators have 7 to 8 channels put in front of them as they're looking to fill 2 or 3 slots."); Paul Farhi, *Pulling the Plug on Capitol Hill*, THE WASHINGTON POST, Feb. 13, 1997, at C-1 ("cable systems at full capacity"); COMMUNICATIONS DAILY, April 2, 1996, at 6 ("Main road block to [launch of C-SPAN3] is lack of channel capacity on most cable systems . . . .").

[28]NCTA Cable Book at 11; *see also* NPRM at ¶ 45.

[29]Charles Haddad, *Disney/ABC Challenges TBS' Cartoon Network*, THE ATLANTA JOURNAL AND CONSTITUTION, April 18, 1998, at 2E ("Few households or cable TV systems are equipped to transmit or receive digital signals."); *see also* Rich Brown, *History Has Cable Future: Survey Rates New Networks Most Likely to be Added to System Line Ups*, Broadcasting & Cable, Apr. 22, 1996, at 47 (only 7.8 percent of surveyed cable operators planned to expand channel capacity using digital compression technology during 1996-97).

[30]Jennifer Files, *TCI Leasing Digital Converters*, THE DALLAS MORNING NEWS, Jan. 14, 1998, at 1D ("TCI is *slowly* beginning to lease digital converter boxes . . . ") (emphasis added); Joel Brinkley, *As Digital TV Arrives, Cable's Picture May Not Be So Clear*, THE NEW YORK TIMES, May 5, 1997 at 1 ("It's just not in the cards economically for most cable systems to do digital compression on their own" according to Cox executive).

Many new networks have delayed launch, or even failed, because of limited channel availability.[31] For example, Q2, an upscale version of QVC, recently announced that the network, after failing to increase distribution beyond 8 million subscribers in four years and losing $50 million in its last two years of operation, would cease distributing its service on October 1, 1998.[32] Similarly, Your Choice TV, a time-shifting programming service, closed its doors on July 31, 1998. A vice president of Your Choice TV attributed the network's failure to its inability to obtain carriage on cable systems, *due in large part to cable operators' fears about digital must-carry requirements.*[33]

Even the largest broadcast networks are not unfamiliar with the difficult road traversed by developing cable networks. CBS recently announced that it was selling half of its Eye On People cable network, serving 11 million subscribers, to Discovery Communications.[34] In announcing the joint venture, CBS stated that it could not justify the ongoing financial strain of supporting a start-up cable network.[35]

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[31]Richard Katz, *Popcorn: The Latest Indie to Die*, MULTICHANNEL NEWS, Nov. 25, 1996, at 1; Jim McConville, *New Nets: Tough Act to Open; Cable Television Launches Postponed*, CABLEVISION, Nov. 27, 1995 (networks delay launches due to lack of channel availability, tight finances, and uncertainty about pending rate deregulation).

[32]Linda Moss, *Comcast Shuts Q2 for Style*, MULTICHANNEL NEWS, Aug. 31, 1998, at 1, 60.

[33]CABLE FAX DAILY, *YCTV Closes Doors: Uncertain Times Cause Demise*, Aug. 4, 1998, at 1 ("Uncertainty over digital must-carry legislation made cable operators reluctant to make room for the service," according to YCTV Vice President Julie Lucas).

[34]Mike Reynolds, *CBS Stumbles in Cable Distribution Game*, CABLE WORLD, Aug. 3, 1998, at 8.

[35]*Id.*

The channel scarcity that hinders new networks' growth has been exacerbated in recent years by various regulatory developments that have further reduced the number of channels available to new, niche programming networks such as Commenters. For example, existing federal must-carry and retransmission requirements, as well as local PEG requirements, have consumed a substantial number of cable system channels.[36] As John Alchin, senior vice president of Comcast Cable explained, "We might have been able to launch several new services without must-carry."[37] Rate regulation also has had the unintended effect of discouraging cable system expansion and the addition of new networks.[38] The Commission's most recent leased access order, which reduced rates that cable operators may charge for leased access channels, also will result in additional channels becoming unavailable to new programming networks.[39]

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[36]*See* 47 U.S.C. §§ 534, 531; Marla Matzer, *TV Land Grabber*, L.A. TIMES, May 24, 1997, at D-1 (must-carry is extra burden on "channel-locked" cable operators); Aaron Barnhart, *Cable Networks Get Choked In Channel Congestion. Even With Upgrades, Niche Contenders Outnumber Open Spaces*, THE KANSAS CITY STAR, April 4, 1997, at E-1 (must-carry makes cable networks sit on sidelines); Richard Zoglin, *Cable's Big Squeeze; New Channels Are Lining Up For Space, But Good Ideas Are Being Shoved Aside By More Of The Same Old Thing*, TIME, June 27, 1994, at 66.

[37]Diane Mermigas, *Channel Capacity Issue Looms Larger For Cable Operators*, ELECTRONIC MEDIA, April 7, 1997, at 49.

[38]*Sixth Order on Reconsideration (Rate Regulation)* at ¶ 22; Ellis Simon, *Cable's Little White Lie*, ELECTRONIC MEDIA, Dec. 9, 1996, at 48 ("going-forward rules are a double edge sword because they limit how much an operator can collect, and therefore, his desire to add channels"); Rich Brown, *New Networks Jockey for Channel Position*, BROADCASTING & CABLE, May 23, 1994, at 42 ("cable rate regulation, limited channel capacity and growing competition for ad dollars have changed the equation for program carriage negotiations").

[39]*Second Report and Order and Second Order on Reconsideration of the First Report and Order*, 12 FCC Rcd 5267 (1997).

The regulatory burdens imposed on cable mean that, for an average sized cable system with 44 channels,[40] up to 15 channels (33 percent) must be provided to analog broadcast stations that qualify for must-carry;[41] at least 3 channels must be set-aside for commercial leased access (10 percent of non-must-carry channels);[42] and typically three channels must be dedicated to public, educational and governmental access programs.[43] *This leaves 23 channels for the over 250 cable networks, including national basic, regional and pay services, competing for the average cable system's subscribers.*

In recent testimony before the United States Senate, Time Warner provided a real-world example of the effects of existing regulation on the channel capacity of its New York City system, the largest cable system in the country, serving over one million subscribers.[44] Time Warner's Chairman explained that the Northern Manhattan portion of the system, which is fully channel-locked, offers subscribers a 31-channel basic service tier. Fourteen of those channels are must-carry analog broadcast signals, and nine are PEG or leased access channels. That leaves

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[40]The majority of the nation's cable systems, about 64 percent, have between 30 and 53 channels. NPRM at ¶ 45.

[41]47 C.F.R. § 76.56(b)(2).

[42]47 U.S.C. § 532(b)(1)(A).

[43]Indeed, local demands for PEG channels have increased in recent years. Peter Lewis, *Local Cable Service May Tie To Internet -- TCI Would Also Offer More Channels*, SEATTLE TIMES, Sept. 27, 1995, at B4 (discussing Seattle's proposed franchise agreement in which Tele-Communications, Inc. was asked to increase its PEG channels from three to ten); *Renewal May Be Near For Century Cable*, HARTFORD COURANT, Dec. 26, 1994, at B2 (discussing "increasing demand for public access and educational programming").

[44]Joseph J. Collins, Chairman and CEO Time Warner Cable, before the Committee on Commerce, Science and Transportation, United States Senate, Washington D.C., July 8, 1998 (Transition to High Definition Television).